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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1938

A. E. McDONALD, PETITIONER

v.

ERNEST O. THOMPSON ET AL., RESPONDENTS

BRIEF OF INTERSTATE COMMERCE COMMISSION AS AMICUS CURIA

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DECISIONS OF THE COURT BELOW

On January 17, 1936, the District Judge granted a temporary restraining order (R. 17) which, after hearing, was made permanent on July 17, 1936 (R. 33). On July 15, 1936, the District Judge approved findings of fact and concluded as a matter of law that the Motor Carrier Act of 1935 superseded the state law in so far as the Texas Act required petitioner to secure a certificate of public convenience and necessity from the authorities of Texas before using the highways in that state to transport property exclusively in interstate commerce (R. 37).

The Circuit Court of Appeals for the Fifth Circuit on appeal, reversed the decision of the District Court (R. 159–170) holding in substance that unless there was direct conflict between the Motor Carrier Act and the state law, the state law would not be superseded (R. 168). The Court further held that no such direct conflict existed in this case (R. 169). The decision of the Circuit Court of Appeals is reported in 95 F. (2d) 937. On October 10, 1938, this Court granted petition for writ of certiorari.

STATEMENT OF FACTS

The pertinent facts are quite simply stated. For a long time prior to June 1, 1935, and at all times since that date, petitioner has been continuously and regularly operating in interstate commerce by motor vehicle over the highways of the States of Texas and Oklahoma exclusively in interstate commerce (R. 35). He has not been engaged in transporting property in intrastate commerce, nor does he desire to do so (R. 160). Within the time permitted by the Grandfather Clause of the Motor Carrier Act, Section 206, or within the time applications might be filed under appropriate orders of extension by the Interstate Commerce Commission, petitioner filed an application for an interstate certificate.[1] Section 206 provides, among other things, that "Pending the determination of any

[1] Report and Recommended Order of Joint Board 16 in M. C. 80, 415, for granting application.

such application the continuance of such operation shall be lawful."

Respondents, E. O. Thompson, C. V. Terrell, and Lon A. Smith, constitute the Railroad Commission of Texas, and W. D. Hood, W. B. Renfro, and Tom Miller, are employees of the Railroad Commission engaged in the enforcement of laws of that state. In the conduct of his interstate business, petitioner had used within the State of Texas federal highways Nos. 75, 77, 80, 81, 90, 281, and 290, which are federal-aided highways (R. 2–4).

On January 16, 1936, after the Motor Carrier Act of 1935 had become effective, petitioner, as the operator of a common-carrier truck line, had a truck loaded with interstate freight stopped by respondents at or near Conroe, Texas, and the driver of the truck was arrested and thrown into jail (R. 142) because he did not hold a state interstrate certificate of convenience and necessity, pursuant to a law of the Texas State legislature passed in 1931, which provides in part as follows:

> SECTION 3. No motor carrier shall, after this Act goes into effect, operate as a common carrier without first having obtained from the Commission, under the provisions of this Act, a certificate of convenience and necessity pursuant to a finding to the effect that the public convenience and necessity require such operation.

In addition to the arrest of this particular driver, respondents had issued orders to all inspectors of

the State Commission to arrest all of petitioner's drivers and to stop his operations.

Alleging the foregoing and other facts, petitioner applied to the District Court for relief, and in this connection alleged, and the District Court sustained these allegations by appropriate findings, that he had complied with all applicable laws of the State of Texas, including public liability and property damage insurance approved by the Commission or its representative (R. 36), and that his trucks had all been registered under the requirements of state law; that all of his trucks were in good mechanical repair and condition and could be safely operated over the highways, and that in all respects the police requirements of the state had been met. He further alleged, and the District Court found, that the provisions of the state law, in so far as they gave to the State Commission power to forbid the use of highways by petitioner's trucks, when engaged exclusively in interstate commerce, had been superseded by the Motor Carrier Act of 1935. Another allegation was that petitioner will be entitled to receive from the Interstate Commerce Commission, a certificate of public convenience and necessity as a matter of right under Section 206 of the Motor Carrier Act. As previously shown Section 206 provides that: "Pending the determination of any such application the continuance of such operation shall be lawful." This section has been construed by the U. S. District Court for the

Western District of Pennsylvania in *Thomas* v. *National Delivery Association,* 24 F. Supp. 171. In that case, which was an action for damages to recover the value of plaintiff's household goods demolished in the course of transit, the Court said:

> * * * The defendant filed an application with the Interstate Commerce Commission for a permit to operate as a contract carrier, for a certificate to operate as a common carrier, and for a brokerage license. No action had been taken by the Interstate Commerce Commission prior to its contract with the plaintiff on these applications, but in view of Sections 206 (a) and 209 (a) of the Motor Carrier Act of 1935, 49 U. S. C. A. §§ 306 (a), 309 (a), both types of operation in which the applicant was engaged, might be lawfully continued pending determination by the Commission on the application. Therefore, at the time it contracted with the plaintiff, the defendant might lawfully operate, both as a common carrier, and as a contract carrier. * * * (Id. 172.)

Answers were filed by the state authorities, in which they claimed jurisdiction and power to prohibit the use of the highways of Texas for the transportation of property for hire if such highways are not of proper construction or in proper condition to maintain said traffic, or if the contemplated use of said highways by the complainant will increase dangers and hazards on said highways and congest traffic thereon and unreasonably interfere with the

use thereof by the public (R. 24). In their answer the state authorities further said that—

> should said complainant present to the Commission an application to transport property for hire in interstate commerce over the highways of this State, that said Commission will hear said application; that in said hearing the respondent Commission will require the applicant to show by facts, circumstances, and conditions that the highways proposed to be used by said applicant are capable of withstanding the proposed use without undue injury and damage to the said highways and without unreasonable interference with the use of said highways by the general public for ordinary purposes; that respondent Commission will not require said applicant to prove that public convenience and necessity requires the proposed service and that said Commission will not consider the adequacy of the existing transportation facilities, or the effect the proposed operation will have upon the existing transportation facilities in determining whether or not it will authorize said applicant to operate over the highways of this State, but that said Commission will refuse to issue plates, tags, identification cards, and authority to use said highways until said plaintiff has procured authority from the Interstate Commerce Commission to so operate (R. 32).

Shortly stated this contention is that the power to regulate interstate commerce by motor vehicle

can only become effective, under the Motor Carrier Act of 1935, by a dual exercise of power on the part of the State and National Governments, and that the assent of the National Government can be made nugatory by the failure of the State to give a similar assent for the use of highways to transport interstate commerce within its borders.

ARGUMENT

I

The lower court's decision is basically contrary to long settled principles of the utmost importance both to the States individually and as a Nation

1. The assumption upon which the decision is bottomed, that jurisdiction placed by a state with its Commission to grant or deny authority for operations in interstate commerce over highways within the state, by a common carrier by motor, does not conflict with the Federal Motor Carrier Act, 1935, disregards the fact that the Federal Act sets up a comprehensive system for the regulation of common carriers in interstate commerce by motor vehicle, with provisions as to excepted matters within a state and with express pronouncement of the national purposes to be served which would be obstructed, or altogether defeated, under the decision; disregards the fact that, by that Act, Congress has occupied the field of "authorization" of such operations in interstate commerce, if indeed, in the absence thereof, the individual states ever had the power to stop common carrier operations in interstate commerce at their boundary lines; misconstrues the language of the Act (sec. 206) with respect to such authorizations, and as particularly pertinent to this case, overlooks the language and purpose of the so-called "grandfather clause" of section 206, which, as particularly designed for applications for authority to operate by motor carriers already engaged in the business and, as necessary to avoid interruptions all over the country in the services rendered to the public (often to those wholly dependent thereon) grants to such carriers upon the filing of their applications within the time provided for, the direct statutory authority to continue their interstate operations pending the Commission's determination

The lower court's decision is, in substance, that the so-called Texas Truck Law requires (and

validly so, despite the Commerce Clause and the Motor Carrier Act, 1935, enacted thereunder) that a common carrier by motor vehicle engaged, or proposing to engage exclusively in interstate commerce, must obtain from the State Commission authority for such interstate operations over highways within the state. The Court hinges its decision upon the view, expressed by it, that there is no conflict between such authority, which it conceives that the state has placed with its Commission, and the authority placed by Congress with this Commission by the Motor Carrier Act, 1935 (Secs. 206, 207); this in part for the reason (as given, in substance, by the Court, 95 F. 2d, 937, 943) that the federal act (Sec. 206) does not provide that every person who receives a certificate from this Commission shall be entitled to the use of the highways of the state but instead "prohibits anyone from engaging in interstate commerce until he receives such certificate" from this Commission. From this statement, it seems plain that the lower court has overlooked important language whereby, as to each of the Act's provisions relating to certificates, when the Commission grants such a certificate, it constitutes the "authorizing" (see Secs. 206, 207) of the operations in interstate commerce over the highways between the states, and, accordingly, the Act does not leave open, after such certificate of authority is given to an applicant for operation in interstate commerce, say, through

several states, for any one of those states to "veto" such authority for operations in interstate commerce, given pursuant to Act of Congress under the Commerce Clause and, moreover, perhaps anxiously desired by all other of the states. The second reason given by the lower court for its view that such power in a State Commission to "veto" authority for operations in interstate commerce given pursuant to the federal act would not give rise to conflict, is because (so it is said) that while this Commission "has jurisdiction over the commercial considerations appertaining to the interstate truck business * * * the preservation and safety of the roads themselves has been left with the state commission." The lower court's view that this Commission's jurisdiction as to interstate operations is confined to commercial considerations is by no means correct, since the Act looks to the Commission in many matters of safety, such as liability insurance, hours of service of employees, safety of operation and other things; and, moreover, it should not be forgotten that, as to hazards due to congestion, or narrow highways, the federal government has made its full contribution to the safety of the public in the most effective way possible, that is, by means of the "federal aid" highways, which have both directly improved such conditions on those highways and tended to relieve congestion on others (*Bush* v. *Maloy*, 267 U. S. 317, at p. 324); which latter, too, might be advanced as

far more effective and possible than the Court's intimation (95 F. 2d 937, 943) that the Congress should have provided for a tribunal, or authorized this Commission, to determine the method or rules and regulations by which the public highways of any state shall be maintained and as to how the safety of the travelling public shall be protected against the dangers of an undne amount of traffic, this seeming to imply, when taken together with earlier discussion in the decision, that Congress should have taken jurisdiction to prescribe the rules and regulations governing the amount of purely intrastate commercial vehicles, which, as matter familiar to all, consists on the highway approaches and suburbs of cities and towns, at least in considerable measure, of commercial vehicles of that kind, commonly known as delivery trucks.

Petitioner McDonald's brief several times emphasizes that the decision of the lower court on review here was not an appeal from report of the Texas Commission denying his application made before the Federal Motor Carrier Act was enacted or from the State Court's opinions reviewing the Commission's, but, instead involves review of the decision of the Circuit Court of Appeals Fifth Circuit reversing the decree of the U. S. District Court enjoining officials of the state from interfering with the operations of his vehicles upon findings and conclusions that the federal act had superseded the state act's requirement for authority

from the State Commission for operation as applying, if ever, to operations in interstate commerce. He is entirely right in his statement that the earlier case involved one set of facts as to what was applied for and as to the facts placed in evidence and that the case on review before this Court involved an entirely different issue. It is also true that the lower court's decision on review here devotes considerable discussion to the facts of the earlier case and, while that case can hardly be regarded as entering into the disposition of the matter on review here it is difficult to refrain from mention of certain things which strike one most forcefully upon reading the lower court's discussion of it. 95 F. 2d. 937, 942. The evidence seems to have consisted of testimony of citizens to the effect that truck traffic has caused congestion on the highways leading into the larger centers of population, especially Houston, Galveston, Dallas, and some of the others such as has made them hazardous to citizens using private automobiles. "They would use the highways more except for this condition." Some having business in those cities which retains them late remain there because of the danger of returning home at night. It is no attempt to rebut the testimony in this other case to make comment on its nature and upon what seems strikingly lacking. We have all experienced the conditions on congested highways leading into large centers of population and certainly there are

few who have not been behind trucks, busses, marketing, and store delivery vehicles, and for a period having had to exercise some measure of patience or restraint. As to the danger mentioned, it is not an attempt to rebut, to comment on the fact that so far as appears there are no specific cases cited with development of the particular causes and conditions, but all seem to be generalities which might be expected almost anywhere. But neither the states, nor the country as a whole, are prepared to deny the highways to commercial vehicles, which serve, not alone industries, producers, retailers, small stores and the like, but also consumers, homes and others receiving deliveries of the goods; and this, although citizens who drive, or are driven, in private cars, taxicabs and the like give little thought to the benefits to them of those uses made of the roads for commercial purposes, which more than likely is true of officials or employees of industries and other producers, depending in considerable measure upon trucks for marketing.

Another feature of the evidence discussed by the lower court from the other case above mentioned is that, with respect to the congestion mentioned, it is not shown whether in large measure it may not consist of intrastate commercial common, contract or private carriers, with store delivery trucks contributing. That is to say, whether the part played by interstate commerce was inconsequential or not

was not shown. In any event, even though interstate commerce contributed in such proportion as to warrant some form or measure of control, it seems to us new doctrine that a state through its Commission has power to altogether stop operations in interstate commerce, or any of them, and this even in the absence of federal legislation, as was the case when the Texas Commission's order was entered.

However, it will be kept in mind, that the assumption in the lower court's decision upon which its validity depends and is, indeed, bottomed by the court itself, is that such authority in a state commission to stop operations in interstate commerce does not conflict with the federal Motor Carrier Act, the one reason of the Court being that above discussed, about the hazards at its approaches of large centers of population due to congestion from commercial operations from intrastate operations and vehicles, on the one hand, and interstate operations, on the other hand; and with this, the Court couples its erroneous construction of the federal act as to authorization of interstate operations, that is, its view that while the federal act prohibits such operations without a certificate in force, it does not provide that each and every applicant receiving one shall be entitled to the use of the various highways of a state. This latter has already been shown to be a misconstruction of the act's language as to certificates of authority generally.

But another thing, particularly pertinent in this case and of great general importance is that the Court cannot have carefully examined the language and considered the purpose of the so-called "grandfather" clause of section 206.

Petitioner was at the time of, and for a number of years prior to, the enactment of the Federal Motor Carrier Act a common carrier by motor truck operating exclusively in interstate commerce over the so-called "federal aid" highways above specified in the statement; and he has ever since been so continuously engaged in such interstate operations. The case, here on review, had its inception by suit filed by petitioner, after enactment of the Act, in the United States District Court, Northern District of Texas to enjoin officials of the state from interfering with his operations in interstate commerce. The District Court, by preliminary order and permanent decree granted the relief prayed for enjoining interference with petitioner's operations, based upon findings of fact and the conclusion that the Federal Motor Carrier Act had superseded the Texas law in so far as it required state authority for the operations in interstate commerce. This decree was reversed by the judgment and decision, before this Court for review, that decision necessarily hinging and depending upon the lower court's view that denial under state law of authority for operations in interstate commerce, which this Commission is authorized to

grant, and may have done so, under the federal act, is not in conflict with the federal act. The reasons why there would be conflict in every case have been given. But in addition the lower court overlooked the fact that this is a case under the grandfather clause and the language and purpose of that clause.

The grandfather clause (sec. 206) is one of the most important provisions in the Motor Carrier Act, 1935, both presently and for many years to come. Appreciation of its purpose and attention paid to its language, is essential to the rights, both of the carriers who have investments made, and business built up, those of shippers relying on their services, and to the country as a whole under the announced policy of Congress in section 202 of the act to promote interstate operations by motor, over the highways, to preserve their inherent natural advantages to the end of developing and preserving "a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense."

This expressly announced policy should be considered, not only in connection with the source of the constitutional powers upon which the legislation rests, but also in construing the subsequent individual provisions of the act; that is, so as not to "cripple" any of them without complete justification and full consideration of the will and purposes of Congress under its constitutional powers.

Federal regulation of motor carriers was imposed upon an industry long established and its provisions requiring certificates of authority to operate, so far as applying to carriers then in operation (of which petitioner is one), was purposely designed with that in mind. Such a carrier upon filing his application within the time provided for is given direct statutory authority, namely authority from Congress itself, to continue his operations pending action thereon by the Commission. In acting upon his application the showing required is not the same as for new operations, but is simply that he shall have been in "bona fide" operation on June 1, 1935, and upon the latter showing, the certificate of authority is given without further proof, or further proceedings (sec. 206).

The reasons for the distinction made between carriers proposing new operations and those already engaged therein are obvious. For one thing there is the announced policy of Congress (sec. 202) to preserve a highway transportation system adapted to the needs of the commerce of the United States and the national defense; and there is the consideration that motor carrier transportation was an established industry, those engaged therein having invested their money and time, and persons and industries having become dependent thereon, and sometimes wholly so. The reason, then, is plain that, if authority was to be required at all of those engaged in the business, their right to continue

operation and the rights of shippers and consumers who had grown to depend thereon, could not await even the filing of applications, and, therefore, the statute itself gives them such authority pending action thereon by the Commission. When petitioner filed his complaint in the District Court the federal motor carrier act was in force and petitioner was then and had been for some years engaged in operations in interstate commerce over the highways involved. Petitioner filed application with this Commission for authorization of his interstate operations within the time provided for and otherwise complying with the Act and the Commission's rules and regulations (R. 151, 36).[2] Accordingly, at the time of the District Court's decision and decree, reversed by the judgment and decision of the appellate court, which are before this Court for review, the situation was that petitioner, common carrier by motor, was, as thousands of others were and still are, operating in interstate commerce under direct statutory authority (sec. 206). This, in and of itself, shows that the lower court was wrong in its basic premise that the requirement upon petitioner that it obtain state authority for operations in interstate commerce, when at the very time it had direct authority therefor under the federal statute, was not in conflict with the federal statute, since it can hardly be assumed that Congress while protecting as lawful the operations in interstate commerce of those already

[2] Report and Recommended Order of Joint Board 16 in M. C. 80, 415, for granting application.

established in the business at the time of the Act pending action by this Commission on the carrier's application intended that the same operations in interstate commerce might be stopped either by one, or any of the forty-eight states, interrupting the services rendered to those relying, or dependent thereon, and doubtless in many cases destroying the carriers' ability to resume it; all of which most certainly conflicts with the purpose and intent of Congress to promote and preserve a highway system of transportation for the needs of the public and the national defense. Furthermore, the situation in this case under the federal statute shows how completely Congress has by that statute occupied the field of "authorization" of common carriage in interstate commerce by motor.

Furthermore, it will have been noted that as to the "grandfather" authorizations, so important to the preservation of what has already been established, the certificate of authorization issues upon showing that the carriers were in bona fide operation in interstate commerce at the time of the Act and continuously thereafter. This further demonstrates that Congress, by the Motor Carrier Act, occupied the whole field of "authorization" of interstate motor common carriage, for it could not be that it left to the states, or any of them, the right to enact laws subsequent to the act which either as matter of fact or law made interstate operations not bona fide which had been bona fide; neither

could it be that, as to such state laws which before 1935 either expressly (if any), or by court construction required state authority for interstate commerce, Congress intended to make exceptions, thus discriminating in their favor, or (as it might well prove to be true) against them. The truth is that under any reasonable construction of the "grandfather clause" the question of "bona fide operation" is committed to this Commission and, as such, it cannot be supposed that Congress intended the Commission to examine and construe state laws, but prescribed the matter of bona fide operation wholly as one of fact. As stated in the *Slagle Case*, 2 M. C. C. 12:

> Prior to the passage of the Act, most of the states had undertaken to regulate to some extent motor carriers engaged in intrastate commerce, and some had undertaken to extend the regulation in various respects to those engaged in interstate or foreign commerce. There were a great variety of such laws and like variations in enforcement. Enforcement was vigorous in some states and lax in others, and, as was natural, laxity was more prevalent as to interstate operations. In the absence of Federal regulation, the situation was a most difficult one for the states which was one of the reasons why their regulatory authorities very generally favored such regulations. The records show that Congress was fully informed in regard to this situation. It might readily, in clear

and unmistakable language, have made compliance with State laws a prerequisite to rights under the "grandfather" clauses, and have indicated how we could determine the fact of compliance or non-compliance. This, however, it did not do. Instead, it employed the phrase *"bona fide"* operation, making registration "under any code of fair competition" evidence of such operation on June 1, 1935, but saying nothing about state laws, which were not mentioned in committee reports or debates in connection with the phrase *"bona fide operation."*

At two places in the Act, Congress made specific provision for compliance with state laws as a prerequisite to obtaining a privilege. Under section 203 (b) (8) a carrier of passengers is not entitled to an exemption that he might otherwise be accorded unless he is "lawfully engaged in the intrastate transportation of passengers in accordance with the laws of each state having jurisdiction." Under section 206 (a) a carrier who has procured a certificate under state laws authorizing intrastate common carrier service is relieved of the requirement of making proof of public convenience and necessity for conducting the same operation in interstate commerce. It seems unlikely that if Congress had intended to make compliance with State laws a condition precedent to "grandfather" privileges, it would have failed to make the same specific provisions that it did in respect to other privileges.

In short under any reasonable construction of the Act at all, Congress has occupied the whole field of "authorization" of interstate common carriage by motor.

Some point is made by respondents that the federal act should be read in such manner as that it would not be unconstitutional, but it would appear that this should be applied not to the federal act, which is wholly clear in its language and purpose, and in the fact that it only purports to apply to interstate commerce, but rather to the state act which speaks of motor transportation within the state generally, that is, without express statement that it applies, or was meant to apply, to interstate commerce. And, while it has been held by this Court to so apply in certain matters of limited control (this before enactment of the federal act), the state act most certainly has not been held to give jurisdiction to the State Commission as to authorization of operations in interstate commerce, which, as is so plainly brought home by this case would mean (if any authority at all) that the State Commission could stop such interstate commerce altogether, not only as to petitioner but others.

As above indicated, it is not believed that this could be done even in the absence of federal legislation under the Commerce Clause. And as petitioner McDonald's brief points out, the courts of the state since enactment of the federal act have endeavored to preserve its constitutionality by not

construing it to confer such jurisdiction on the State Commission. Petitioner also refers to decisions of Florida courts rendering like decisions since enactment of the federal act.

The truth is that under the bare commerce clause itself, that is, in the absence of the federal Motor Carrier Act, it seems to us wholly new doctrine that a state (which means any of the states that choose to do so) could either directly, or through its Commission have power, not simply to control in some manner conducive to safety, but to *stop* operations in interstate commerce. There are, of course, many things, constituting interstate commerce, but underlying and necessary to all is interstate transportation, except perhaps interstate transmission of messages. This, it seems to us, should be kept in mind in connection with the many decisions as to the limits of state authority in respect of interstate commerce. For long before railroad transportation was a thing known at all, the roads and highways were the principal, and sometimes, the only mediums of commerce between the states. It is not believed that the "Commerce Clause" is changed because there has been added to other forms of interstate commerce, that by motor vehicle, particularly having in mind the conditions that brought about its adoption and that there are now forty-eight states instead of thirteen.

All of the above is intended to relate to the contention of respondent as to its proprietary rights

of its highways; for it cannot be disputed but that, along with the adoption of the Commerce Clause, the states opened their roads and highways to interstate commerce with those limitations always obtaining, but always with the federal government paramount where it has occupied the field; that being so even as to matters pertaining to safety where, as in the present case, the state's law (as construed to empower its commission to deny common carrier operations exclusively interstate over highways within the state) inescapably would conflict with the federal act, whereunder the same operations in interstate commerce might be authorized. As confirming that the use of the highways for interstate commerce was granted by adoption of the Commerce Clause, mention might be made of the many decisions of this Court which have held state laws regulating use of their highways in interstate commerce valid "in the absence of regulation" by Congress. And as further confirming the same the following is quoted from *Bush Co.* v. *Maloy,* 267 U. S. 317, 323, 324:

> A statute of Maryland prohibits common carriers of merchandise or freight by motor vehicle from using the public highways over specified routes without a permit. The Public Service Commission is charged with the duty to "investigate the expediency of granting said permit" when applied for; and it is authorized to refuse the same if it "deems the granting of such permit preju-

dicial to the welfare and convenience of the public." Laws of Maryland, 1922, c. 401 § 4.

This case presents two features which were not present in *Buck* v. *Kuykendall*, *ante*, p. 307, decided this day. The first is that the highways here in question were not constructed or improved with federal aid. This difference does not prevent the application of the rule declared in the *Buck Case*. The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce. The second feature is that here the permit was refused by the Commission; not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The state action in the *Buck Case* was held to be unconstitutional, not because the statute prescribed an arbitrary test for the granting of permits, or because the Director of Public Works had exercised the power conferred arbitrarily or unreasonably, but because the statute as construed and applied invaded a field reserved by the Commerce Clause for federal regulation.

The events leading up to the passage of The Motor Carrier Act, 1935 (U. S. Code, Sup. I, Title 49, Chapter 9) are well known. By that Act, Con-

gress entered for the first time upon the field of regulation of motor carriers operating in interstate commerce upon the highways of the Nation. For some years prior thereto many of the states had enacted laws providing for the regulation of motor carriers operating within their borders, but because of the diversity in such laws and the inability of such states to regulate these carriers in many particulars, even in the absence of federal regulation, there was an insistent public demand for regulation by the National Government. That Congress intended to adopt at one time a comprehensive regulatory scheme for such carriers is evident from an examination of the Act. General duties and powers are given to the Commission in the regulation of common carriers by motor vehicle, as well as of contract carriers and brokers (Section 204); over certificates of public convenience and necessity for operation in interstate or foreign commerce on any public highway (Section 206); over permits for contract carriers (Section 207); over brokers and brokerage licenses (Section 204 (4) and Section 211); over the suspension, revocation, and transfer of certificates and permits (Section 212); over consolidations, mergers, and acquisition of control (Section 213); over the issuance of securities (Section 214); over security for the protection of the public (Section 215); over rates, fares and charges of common carriers by motor vehicle (Section 216); over tariffs of common car-

riers and of contract carriers by motor vehicle (Sections 217 and 218); over accounts, records, and reports (Section 220), and many other matters referred to in the Act, the better to enable the Commission to carry out the declaration of policy embodied in Section 202 (a), which reads:

> It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and co-ordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

2. Federal power is paramount

We had supposed that at least since *Gibbons* v. *Ogden*, 9 Wheat. 1, it was settled that where there was repugnancy between state and federal law, the

latter prevailed. In that case, Chief Justice Marshall said:

> Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial, whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. This opinion has been frequently expressed in this court, and is founded, as well on the nature of the government, as on the words of the constitution. In argument, however, it has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution,

> they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it (Id. 210–211).

In *Chicago, I. & L. Ry. Co.* v. *United States,* 219 U. S. 486, involving the question of whether a common carrier could accept for services rendered other than cash, this Court said:

> We need say but little about the Indiana statute upon which the defense is in part based. The transactions, in respect of which the Government seeks relief, being interstate in their character, the acts of Congress as to such transactions are paramount. No

state enactment can be of any avail when the subject of such transactions has been covered by an act of Congress acting within the limits of its constitutional powers. It has long been settled that when an "act of the legislature of a State prescribes a regulation of the subject repugnant to and inconsistent with the regulation of Congress, the state law must give way, and this without regard to the source of power whence the state legislature derived its enactment." *Sinnot* v. *Davenport*, 22 How. 227, 243; *M., K. & T. Railway* v. *Haber*, 169 U. S. 613, 686; *Reid* v. *Colorado*, 187 U. S. 137. This results, Chief Justice Marshall said in *Gibbons* v. *Ogden*, 9 Wheat. 1; as well from the nature of the Government as from the words of the Constitution (Id. 497).

In *Reid* v. *Colorado*, 187 U. S. 137, relating to importation of infected cattle, this Court said:

> It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce,

all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Morgan* v. *Louisiana*, 118 U. S. 455, 464; *Hennington* v. *Georgia*, 163 U. S. 299, 317; *N. Y., N. H. & H. R. R. Co.* v. *New York*, 165 U. S. 628, 631; *Missouri, Kansas & Texas Railway Co.* v. *Haber*, 169 U. S. 613, 626; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States (Id. 146–147).

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, this Court stated the question as follows:

> The question in the case is the validity of an act of the State of North Carolina which requires the agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same, under penalty of forfeiting $50 a day to the aggrieved party for each day of refusal to receive such freight and all damages actually sustained.

To give the states the power sought to be here exercised, said the court:

> would destroy absolutely Federal control until the freight was in the possession of the carrier, and is directly contradictory of the provision of the Interstate Commerce Act which we have quoted. See, in this connection, *Houston & Texas Cent. R. R. Co.* v. *Mayes,* 201 U. S. 321. * * * By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do and punishes disobedience by successive daily penalties.

In *Minnesota Rate Cases,* 230 U. S. 352, this Court held that the paramount authority of Congress enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, Congress may displace local laws by substituting laws of its own.

As stated in *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412.

> It is of course settled that when Congress has exerted its paramount legislative author-

> ity over a particular subject of interstate commerce, state laws upon the same subject matter are superseded.

Again, in *Chi., R. I. & P. Ry.* v. *Hardwick Elevator Co.*, 226 U. S. 426, in a case considering the validity of the Minnesota reciprocal demurrage law in the light of the Interstate Commerce Act dealing generally with the subject of delivery of cars, this Court said:

> As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulaiton, even if such subject was embraced within that class of powers concerning which the State had a right to exert is authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such

> action, when exerted covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power (p. 435).

That the entry of the national government into the field of regulation of interstate commerce will exclude state power thereover, as to all matters coming within the general purposes of the federal legislation is made clear in a number of decisions of the Court.

In *N. Y. Cent. R. R. Co.* v. *Winfield*, 244 U. S. 147, a New York workmen's compensation act was held inapplicable to railroad employees engaged in interstate commerce, because of the Federal Employer's Liability Act. The federal act purported only to change the rules of liability in negligence cases, while the New York act provided for liability regardless of negligence. It was argued that both acts might stand, as they covered different fields. This the court denied, saying:

> * * * If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose.

In *Kansas City So. Ry. v. Van Zant*, 260 U. S. 459, the Hepburn Act of 1906, prohibiting free railroad passes for interstate journeys, except to a limited class of persons, was held to nullify all state laws pertaining to liability for injuries sustained by persons while using such passes. Thereafter liability in such cases is determined by Federal law, although the free pass law made no reference to liability.

Prior to 1910, the liability of telegraph companies for negligence in sending or delivering messages was determined by local law, fixed in many states by statutes. The Mann-Elkins Act of 1910, brought telegraph companies under the general provisions of the Interstate Commerce Act relating to uniformity of rates and equality of service. No provision in the act pertained to liability for negligence, but the Supreme Court held that in view of the general purposes of the act, state laws covering liability were invalid from the time of the entry of the National Government into the field of regulation. It said:

> We think it clear that the act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the act to regulate commerce to establish, a purpose which would be wholly destroyed if, as held by the court below, the validity of contracts made by telegraph companies as to their interstate commerce business con-

tinued to be subject to the control of divergent and it may be conflicting local laws.

Postal Tel. Co. v. *Warren-Godwin L. Co.*, 251 U. S. 27.

To the same effect is *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, where the court said:

> The proposition that the act of 1910 must be narrowly construed so as to preserve the reserved powers of the state over the subject in hand, although it is admitted that that power is in its nature federal and may be exercised by the state only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice. We therefore consider the statute in the light of its text and, if there be ambiguity, of its context, in order to give effect to the intent of Congress as manifested in its enactment.
>
> As the result of doing so, we are of the opinion that the provisions of the statute bringing telegraph companies under the Act * * * so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly, an interstate telegram * * *.

3. There can be no divided authority over interstate commerce

It would be difficult to find a case so clearly illustrating the principle that there can be no divided

authority over interstate commerce than the one now before the court. Indeed, we think it is highly questionable, if the decision of the Circuit Court of Appeals is correct, that there is even a divided authority on the part of the National Government. Rather it would seem that the state is supreme. For if a certificate from the Interstate Commerce Commission to a motor vehicle carrier to operate in interstate commerce does not mean anything unless the states through which the carrier runs happen to reach the same conclusion as to interstate operation as the Federal Commission, then it would seem that the states have the final and dominant say. The anomalous situation would prevail of the State possessing a veto authority over matters granted to the Federal Government under the Constitution. It is well settled, however, by your decisions that "there can be no divided authority over interstate commerce." To escape this conclusion the lower court appears to rest its decision upon the ground that there is no conflict as between the federal and the state laws because the regulations of the State Commission and the operations of state laws go more to safety of the public on the highways, a matter peculiarly within the control of the state. Whatever the underlying grounds, the fact remains that there is a conflict between the Federal and the State Governments on the same subject matter, because it would lie within the authority of Texas, under the decision of the lower

court in this case, to nullify any grant of authority given by the Interstate Commerce Commission. And, of course, if Texas has the authority to so nullify, it must be conceded that other states under similar laws could be given similar authority. When we consider the number of motor vehicle operators with vehicles running into two or more states, the possible consequences of such a holding become painfully apparent. Such a holding would make the efficacy of the Federal act rest upon the mere permission of the State. That such is not the law is clear from this Court's decision in *Napier* v. *Atlantic Coast Line*, 272 U. S. 605, 612–613, where you said:

> The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state leg-

> islation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. * * *

We will not cite the cases holding that there can be no divided authority over interstate commerce; one will suffice. In *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404, 408, you said:

> * * * It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive. Transportation from Oxly to Saint Louis over the route partly within and partly outside of Missouri is interstate commerce. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 620; *Western Union Telegraph Co.* v. *Speight*, 254 U. S. 17. It was shown that the shipment would have moved by that route. The record discloses no facts which would impose upon petitioner any obligation to haul respondent's lumber over the intrastate route. See *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 482. The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. *Chicago, Rock Island & Pacific Ry.*

v. *Hardwick Elevator Co.*, 226 U. S. 426, 435; *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, 435. *Steel* v. *Railroad*, 165 Mo. App. 311; 317 (Id. 408).

4. The police powers of the state are subject to the provisions of the Federal Constitution

The Circuit Court of Appeals based its decision of no conflict between the state and federal authorities because the Motor Truck Laws of Texas require the Railroad Commission ~~of the State~~ of Texas to determine whether or not the preservation of its highways and the safety of the traveling public will be endangered if there is an excessive amount of traffic on the highways (R. 169).

It is a well-recognized principle that police powers, otherwise within the constitutional power of the state, will be upheld if interstate commerce is only remotely and indirectly affected. *Silz* v. *Hesterberg*, 211 U. S. 31; *Southern Ry. Co.* v. *King*, 217 U. S. 524; *Townsend* v. *Yeomens*, 301 U. S. 441; *Erie R. Co.* v. *Williams*, 233 U. S. 685; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *North Dakota* v. *Hanson*, 215 U. S. 515; *Adams Express Co.* v. *New York*, 232 U. S. 14; *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280, *Asbell* v. *Kansas*, 209 U. S. 251.

It is also settled that a state statute which is a burden on interstate commerce is not saved by calling it an exercise of the police power. *Charleston & Car. R. Co.* v. *Varnville Co.*, 237 U. S. 597.

In *Adams Express Co.* v. *Croninger,* 226 U. S. 491, it was held that only the silence of Congress allows a state to exercise its police power over interstate commerce, and when Congress speaks, it governs.

Western Union Telegraph Co. v. *Pendleton,* 122 U. S. 347, is authority for the holding that the police powers of a state cannot encroach on the powers vested in Congress by the Federal Constitution. (See also *Central of Georgia Ry.* v. *Murphey,* 196 U. S. 194.)

In *Southern Ry. Co.* v. *Virginia,* 290 U. S. 190, 196, 198, this Court held that the police power as well as all other powers of the state, are subject to the provisions of the Fourteenth Amendment.

In *Missouri, Kansas & Texas Ry. Co.* v. *Harris,* 234 U. S. 412, this Court held that when the Congress exerts its paramount authority over interstate commerce, state laws are superseded. Examples of state laws which have been held void because in actual conflict with Acts of Congress will be referred to.

In *Nashville, C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405, this Court held that the police power of the state is subject to the constitutional limitation and that its action must not be arbitrary (415).

In *Asbell* v. *Kansas,* 209 U. S. 251, this Court held that while a state may, under its police power, enact inspection laws on traffic coming from other states, in the absence of action by Congress, the Court will

determine for itself whether the state is genuinely exercising its police power or whether it is regulating interstate commerce.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, this Court held that even when the particular subject remains unregulated by Congress a state cannot lay burdens on interstate commerce under the guise of police regulations.

In *Adams Express Co.* v. *Kentucky*, 214 U. S. 218, the Court held that any exercise of a power by a state regulating interstate commerce is void, and that when the police power conflicts with powers of Congress it is superseded.

Examples of state laws that have been held invalid because they directly affect interstate commerce are as follows:

In *Herndon* v. *Chicago, R. I. & P. Ry. Co.*, 218 U. S. 135, this Court held that where a railroad had already provided adequate accommodations at a particular point, a state law requiring interstate trains to stop at such point is a burden on interstate commerce.

In *DiSanto* v. *Pennsylvania*, 273 U. S. 34, the Court held that the solicitation of passengers and the sale of steamship tickets for passage between the United States and Europe is a part of foreign commerce and a state law directly interfering therewith was invalid, regardless of the purpose for which the state law was passed.

In *McLean* v. *Denver & Rio Grande R. Co.*, 203 U. S. 38, the Court held that even an inspection law affecting interstate commerce would be invalid if in conflict with an Act of Congress, or an attempt to regulate interstate commerce.

In *St. Louis-San Francisco Ry. Co.* v. *Missouri Commission*, 261 U. S. 369, this Court held that an order of the State Commission requiring the railroad company to stop a designated train at a particular city to take on and discharge passengers was void as a burden on interstate commerce. Other decisions of this Court holding that orders requiring fast trains to stop at towns already adequately served constitute burdens on interstate commerce are *Mississippi* v. *Illinois Cent. R. Co.*, 203 U. S. 335; *Illinois Cent. R. Co.* v. *Illinois*, 163 U. S. 142, and *St. Louis-San Francisco Ry. Co.* v. *Missouri Commission*, 254 U. S. 535.

In *Missouri, Kansas & Texas R. Co.* v. *Texas*, 245 U. S. 484, an order of the Texas Commission requiring passenger trains to leave stations on scheduled time, with thirty minutes allowance to make connections, was void as a burden on interstate commerce. To compel railroads to try cases in a state remote from where the cause of action arose was held to constitute a burden on interstate commerce in *Davis* v. *Farmers Co-Operative Ass'n.*, 262 U. S. 312, and in *Michigan Central R. Co.* v. *Mix*, 278 U. S. 492.

An order of a State Commission preventing a railroad company from removing its shop and division point to another place in the same state was held invalid in *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To the same effect see *Texas* v. *United States*, 292 U. S. 523.

In *Ingels* v. *Morf*, 300 U. S. 290, this Court construed the Caravan Act of a state and held that the fee exacted thereunder was a burden on interstate commerce because in excess of the cost of regulation.

In *Matson Co.* v. *California*, 297 U. S. 441, this Court held that a tax by the state on earnings from interstate commerce was void as constituting a burden on interstate commerce.

In *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, this Court held that a tax by a state on gross receipts from sales in interstate commerce was void as a burden on that commerce.

In *Puget Sound Co.* v. *Tax Commission of Washington*, 302 U. S. 90, the Court held that a tax by the state from business of stevedoring, which was interstate commerce, was void as constituting a burden thereon.

In *Cooney* v. *Mountain States Telephone Co.*, 294 U. S. 384, the Court held that an act of a state imposing a tax on telephones irrespective of their use in interstate or intrastate commerce was void as a burden on interstate commerce.

A municipal ordinance requiring everyone going from place to place, taking orders for future deliveries and receiving deposit in advance, to secure a license and pay a fee before engaging in such business, was void as a burden on interstate commerce as applied to solicitors of a corporation engaged in manufacturing goods in another state and selling them direct to consumers on orders taken by associates. *Real Silk Hosiery Mills* v. *Portland,* 268 U. S. 325. (See also *Crutcher* v. *Ky.,* 141 U. S. 47.)

A state law requiring articles in interstate commerce to be labelled under the Pure Food Law of a state was held void as a burden on interstate commerce in *McDermott* v. *Wisconsin,* 228 U. S. 115.

Other decisions of this Court dealing with the question of what constitutes a burden on interstate commerce are so numerous that further citation seems unnecessary.

In *Robbins* v. *Shelby Taxing District,* 120 U. S. 489, this Court held that the people of this country are citizens of the United States as well as of individual states and have some rights under the United States Constitution, free from interference or restraint by the State.

In *Carley & Hamilton* v. *Snook,* 281 U. S. 66, this Court held that in cases arising under the Commerce Clause, it must ascertain for itself whether a forbidden burden on interstate commerce is imposed.

In *Minnesota Rate Cases,* 230 U. S. 352, this Court said:

> They have no power to prohibit interstate trade in legitimate articles of commerce (citing cases); or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on (citing cases); or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection (citing cases).

In *Brown* v. *Houston,* 114 U. S. 622, the Court said:

> * * * It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. In short, it may be laid down as the settled doctrine of this court, at this day, that a State can no more regulate or impede commerce among the several States than it can regulate or impede commerce with foreign nations.

That the States lack the power to grant or deny operating authority to motor carriers engaged in interstate commerce has been settled law since the

case of *Buck* v. *Kuykendall*, 267 U. S. 307, decided in 1925. There Buck applied to the Washington authorities to operate a motor carrier line within that State as part of a route between Seattle and Portland, Oregon. The Oregon Commission had granted him authority, but the Washington official denied his application under a provision of the State statute which prohibited common carriers for hire from use of the State highways without having first obtained a certificate of public convenience and necessity from the State. The court said:

> It may be assumed that Section 4 of the state statute is consistent with the Fourteenth Amendment; and also, that appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. Compare *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 571. The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by

> resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the State of Oregon had issued its certificate which may be deemed equivalent to a legislative declaration that, despite existing facilities, public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause.

To the same effect is the case of *Bush Co.* v. *Maloy,* 267 U. S. 317. These cases, and the principle therein announced, have been followed by State and Federal courts. See *United States* v. *Scott,* 10 Fed. Supp. 453–9; *Asher* v. *Ingels,* 13 Fed. Supp. 654; *United States* v. *Union Pac. R. Co.,* 20 Fed. Supp. 665.

Of particular significance is the decision of the three-judge court for the Northern District of Texas, in *Sage et al.* v. *Baldwin,* 55 Fed. (2d) 968, decided February 5, 1932. This case involved facts quite similar to the case at bar. Petitioners were engaged exclusively in interstate commerce through the State of Texas as contract carriers, and while

engaged therein were threatened with arrest by defendant because of their failure to comply with the motor carrier order of Texas effective August 22, 1931 (Vernon's Ann. Civ. St. Tex. Art. 911b, Section 1 et seq.), which is the identical law before this Court. In the *Sage case,* decided prior to the Motor Carrier Act of 1935, the Court held that "interstate commerce in all of its forms, must be free from any substantial burden sought to be exercised by any state." In its decision and as affording a basis for the decree to be entered, the Court said:

> Preserving, therefore, the rights of the state and the rights of the nation, the respondents will be enjoined from interfering with the operations of the complainants, or from arresting them for alleged violations of this law, so far as any rates may be concerned, or so far as any bond securing any shipper may be concerned, *or so far as any certificate of public convenience or necessity is concerned,* or so far as the impairment of any other service, either contract or common carrier is concerned, * * *. [Italics ours.] (Id. 971.)

In the course of its opinion the Court referred to the decision of the Supreme Court of Iowa in *State* v. *Martin,* 210 Iowa, 207, 230 N. W. 540, where that court had under consideration a general statute directed at automobile carriers. Speaking of this Iowa decision in the *Sage case,* the court said:

> * * * The provision therein for bonds and for a certificate of convenience and necessity was manifestly invalid as to interstate commerce carriers, * * * (p. 970).

If as the Court held, the State Commission had no authority over certificates of public convenience and necessity in interstate commerce prior to the passage of the Motor Carrier Act, it needs no argument to show that after Congress had occupied the field and by specific legislation with respect to the subject matter, no vestige of a claim for authority on the part of the states can be made.

CONCLUSION

This case is one that has been peculiarly susceptible for presentment of our views based upon prior decisions of the court. It is certain from those authorities that complete elimination of petitioner from a right to operate in interstate commerce is a positive and direct burden on interstate commerce, and a practice more onerous and harmful than many others heretofore held void by this Court.

We attach no particular significance to the decision of this Court in *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, where the court held that in the absence of national legislation, a state could adopt regulations limiting the

weight and width of vehicles, applicable without discrimination to those moving in interstate and intrastate commerce. Here the situation is that operations in interstate commerce authorized under the Federal Motor Carrier Act, may, according to the decision of the lower court, be denied by a state commission.

As heretofore shown, it is declared to be the purpose of Congress in Section 202 (a) "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation."

It is apparent that state power of control, particularly in a negative manner, that is, by denying a certificate, in the matter of certificates or permits for operations in interstate commerce, is in direct conflict with the expressed purposes of the Motor Carrier Act.

Further than this, in Section 202 (c) of the Motor Carrier Act, Congress undertook to name the powers previously exercised by the states which it did not desire to touch. The powers of taxation and regulation of intrastate commerce are there expressly reserved for state control. If other matters, including state certificates to operate in interstate commerce, were intended to be reserved for the states, this section was the natural place to so declare.

We have had an opportunity to examine the brief filed by the Attorney General of Texas, on behalf of the Railroad Commission of that State, and it seems to us that there is nothing inconsistent therein with our contentions. The authorities relied upon so heavily there went to the police power of the State to indirectly affect interstate commerce by appropriate *regulations;* they do not support the claim here that the State has the right of *prohibition* against operators in interstate commerce. The distinction is between reasonable regulation that incidentally affects interstate commerce and absolute prohibition that actually impedes the flow of such commerce. We submit that the latter is the question here, and such a result may not be accomplished by calling it an exercise of the police power.

This case presents considerations which have a vital effect upon the principles of regulation generally. It is of importance in the proper administration of the duties of the Commission that its power and authority shall be defined by this Court and we respectfully submit that the effectiveness of this authority should not be made to depend upon the State Commission and the Interstate Commerce Commission reaching the identical conclusion.

For the reasons above set further we request that the judgment of the Circuit Court of Appeals

should be reversed and the action of the District Court sustained.

DANIEL W. KNOWLTON,
E. M. REIDY,
For Interstate Commerce Commission.

NOVEMBER 7, 1938.

APPENDIX

Pertinent provisions of The Motor Carrier Act, 1935, U. S. Code, Sup. I, Title 49, Chapter 9,[1] are:

SEC. 201. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 301.*] This part may be cited as the "Motor Carrier Act, 1935."

DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

SEC. 202. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 302.*] (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a

[1] The act of August 9, 1935 (49 Stat. L. 543), amended the Interstate Commerce Act, as amended, by substituting for the words "this Act," wherever they occurred, the words "this part," but provided that "such part I may continue to be cited as the 'Interstate Commerce Act,' and that the Interstate Commerce Act should be further amended by adding Part II, the Motor Carrier Act, 1935.

highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

(b)[2] The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

(c)[3] Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

DEFINITIONS

SEC. 203. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 303*][4] (a) As used in this part—

(1) The term "person" means any individual, firm, copartnership, corporation, company, association, or joint-stock associa-

[2] For similar declaration as to applicability of part I, see sec. 1 (1), ante.

[3] Saving clause as to part I, sec. 1 (2) (a), ante.

[4] Definitions of terms employed in part I, sec. 1 (3); of transportation territorially subject to part I, sec. 1 (1), ante.

tion; and includes any trustee, receiver, assignee, or personal representative thereof.

(2) The term "board" or "State board" means the commission, board, or official (by whatever name designated in the laws of a State) which, under the laws of any State in which any part of the service in interstate or foreign commerce regulated by this part is performed, has or may hereafter have jurisdiction to grant or approve certificates of public convenience and necessity or permits to motor carriers, or otherwise to regulate the business of transportation by motor vehicles, in intrastate commerce over the highways of such State.

(3) The term "Commission" means the Interstate Commerce Commission.

(4) The term "joint board" means any special board constituted as provided in section 205 of this part.

(5) The term "certificate" means a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle.

(6) The term "permit" means a permit issued under this part to contract carriers by motor vehicle.

(7) The term "license" means a license issued under this part to a broker.

(8) The term "State" means any of the several States and the District of Columbia.

(9) The term "express company" means any common carrier by express subject to the provisions of part I.

(10) The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by

motor vehicle and partly by rail, express, or water.

(11) The term "foreign commerce" means commerce between any place in the United States and any place in a foreign country, or between places in the United States through any foreign country, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

(12) The term "highway" means the roads, highways, streets, and ways in any State.

(13) The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails.

(14) The term "common carrier by motor vehicle" means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of part I.

(15) The term "contract carrier by motor vehicle" means any person, not included under paragraph (14) of this section, who or which, under special and individual contracts or agreements, and whether directly or by a lease or any other arrangement,

transports passengers or property in interstate or foreign commerce by motor vehicle for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

(18) The term "broker" means any person not included in the term "motor carrier" and not a bona fide employee or agent of any such carrier, who or which, as principal or agent, sells or offers for sale any transportation subject to this part, or negotiates for, or holds himself or itself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts, or arranges for such transportation.

(19) The "services" and "transportation" to which this part applies include all vehicles operated by, for, or in the interest of any motor carrier irrespective of ownership or of contract, express or implied, together with all facilities and property operated or controlled by any such carrier or carriers and used in the transportation of passengers or property in interstate or foreign commerce or in the performance of any service in connection therewith.

(20) The term "interstate operation" means any operation in interstate commerce.

(21) The term "foreign operation" means any operation in foreign commerce.

(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a cooperative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers;

nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*Added August 9, 1935.*] [U. S. *Code, Sup. I, title 49, sec. 306.*] (a)[5] No

[5] Compare, as to certificates of convenience and necessity for carriers by railroad, sec. 1 (18)–(20), ante.

common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and

such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require. Any person, not included within the provisions of paragraph (a) of this section, who or which is engaged in transportation in interstate or foreign commerce as a common carrier by motor vehicle when this section takes effect may continue such operation for a period of one hundred and twenty days thereafter without a certificate and, if application for such certificate is made to the Commission within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission.

ISSUANCE OF CERTIFICATE

SEC. 207. [*Added August 9, 1935.*] [*U. S. Code, Sup. I, title 49, sec. 307.*] (a)[6] Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

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[6] Compare, as to certificates of convenience and necessity for carriers by railroad, sec. 1 (18)–(20), ante.

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